No. 87-368

Supreme Court, U.S.
FILED
OCT 14 1987
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1987

BANK OF NEW ENGLAND, N.A., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General

WILLIAM F. WELD
Assistant Attorney General

SARA CRISCITELLI
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether the jury instructions on knowledge and willfulness were erroneous.

2. Whether, under a prior version of 31 U.S.C. 5322(b), individual violations of the Bank Secrecy Act could properly be prosecuted as felonies, where each such violation was "part of a pattern of illegal activity involving transactions of more than $100,000 in a 12-month period."

TABLE OF CONTENTS

	Page
Opinion	1
Jurisdiction	1
Statement	1
Argument	9
Conclusion	18

TABLE OF AUTHORITIES

Cases:

Ash Sheep Co. v. *United States*, 252 U.S. 159 (1920) 14
Cupp v. *Naughten*, 414 U.S. 141 (1973) 10, 13
Inland Freight Lines v. *United States*, 191 F.2d 313 (10th Cir. 1951) 10
Opper v. *United States*, 348 U.S. 84 (1954) 17
Richardson v. *Marsh*, No. 85-1433 (Apr. 21, 1987) 17
Riss & Co. v. *United States*, 262 F.2d 245 (8th Cir. 1958) 10
Spencer v. *Texas*, 385 U.S. 554 (1967) 17
St. Johnsbury Trucking Co. v. *United States*, 220 F.2d 393 (1st Cir. 1955) 10
United States v. *Anzalone*, 766 F.2d 676 (1st Cir. 1985) .. 4
United States v. *Beusch*, 596 F.2d 871 (9th Cir. 1979) 14, 15, 17
United States v. *Boyer*, 694 F.2d 58 (3d Cir. 1982) 11
United States v. *Culbert*, 435 U.S. 371 (1978) 14
United States v. *Dela Espriella*, 781 F.2d 1432 (9th Cir. 1986) 4
United States v. *Demauro*, 581 F.2d 50 (2d Cir. 1978) 11, 12
United States v. *Denemark*, 779 F.2d 1559 (11th Cir. 1986) 4
United States v. *Gold*, 743 F.2d 800 (11th Cir. 1984), cert. denied, 469 U.S. 1217 (1985) 12
United States v. *Guillette*, 547 F.2d 743 (2d Cir. 1976), cert. denied, 434 U.S. 839 (1977) 10
United States v. *Hathaway*, 798 F.2d 902 (6th Cir. 1986) 11
United States v. *Hecht*, 705 F.2d 976 (8th Cir. 1983) 10

Cases—Continued: Page

United States v. *Illinois Central R.R.*, 303 U.S. 239 (1938) 12
United States v. *Kallash*, 785 F.2d 26 (2d Cir. 1986) 10
United States v. *Kattan-Kassin*, 696 F.2d 893 (11th Cir. 1983) 13, 15, 16
United States v. *Lanza*, 790 F.2d 1015 (2d Cir. 1986), cert. denied, No. 86-5129 (Oct. 6, 1986) 11
United States v. *Larson*, 796 F.2d 244 (8th Cir. 1986) 4
United States v. *Lemire*, 720 F.2d 1327 (D.C. Cir. 1983), cert. denied, 467 U.S. 1266 (1984) 10
United States v. *Markowski*, 772 F.2d 358 (7th Cir. 1985), cert. denied, 475 U.S. 1018 (1986) 10
United States v. *Pomponio*, 429 U.S. 10 (1976) 12
United States v. *Reinis*, 794 F.2d 506 (9th Cir. 1986) 4
United States v. *Sawyer Transp., Inc.*, 337 F. Supp. 29 (D. Minn. 1971), aff'd, 463 F.2d 175 (8th Cir. 1975) ... 10
United States v. *Schaffer*, 600 F.2d 1120 (5th Cir. 1979) .. 11
United States v. *Schiff*, 801 F.2d 108 (2d Cir. 1986), cert. denied, No. 86-1026 (Mar. 30, 1987) 11
United States v. *So*, 755 F.2d 1350 (9th Cir. 1985) 15, 16, 17
United States v. *Swafford*, 766 F.2d 426 (10th Cir. 1985) 10
United States v. *T.I.M.E.-D.C., Inc.*, 381 F. Supp. 730 (W.D. Va. 1974) 10
United States v. *Toner*, 728 F.2d 115 (2d Cir. 1984) 10
United States v. *Turkette*, 452 U.S. 576 (1981) 14
United States v. *Varbel*, 780 F.2d 758 (9th Cir. 1986) 4

Statutes and regulation:

Act of Oct. 12, 1984, Pub. L. No. 98-473, § 901(b), 98 Stat. 2135 3
Bank Secrecy Act:
31 U.S.C. 5313 ..... 1, 2
31 U.S.C. 5313(a) 2
31 U.S.C. 5322 ..... 1, 3
31 U.S.C. 5322(a) 2, 3
31 U.S.C. 5322(b) 3, 9, 13, 14, 16

Statutes and regulation: Page

Money Laundering Control Act of 1986, Pub. L. No. 99-570, § 1357(g), 100 Stat. 3207-26 3

18 U.S.C. 1962(a) 13

21 U.S.C. (& Supp. III) 848 13

31 C.F.R. 103.22(a)(1985) 2

Miscellaneous:

Note, Developments in the Law—Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions, 92 Harv. L. Rev. 1227 (1979) 10

S. Rep. 99-433, 99th Cong., 2d Sess. (1986) 3

In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-368

BANK OF NEW ENGLAND, N.A., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A30) is reported at 821 F.2d 844.

JURISDICTION

The judgment of the court of appeals (Pet. App. A31) was entered on June 10, 1987. A petition for rehearing was denied on July 6, 1987 (Pet. App. A32). The petition for a writ of certiorari was filed on September 1, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Massachusetts, petitioner, a corporation, was convicted on 31 counts of failing to file currency transaction reports (CTRs), in violation of 31 U.S.C. 5313 and 5322, and was fined $40,000 on each count, for a

total fine of $1,240,000.[1] The court of appeals affirmed (Pet. App. A1-A30).

1. Under the Bank Secrecy Act and the regulations promulgated under it, financial institutions must file a CTR whenever they are "involved in a transaction for the payment, receipt, or transfer of United States coins or currency" in excess of $10,000 (Pet. App. A2; 31 U.S.C. 5313(a); 31 C.F.R. 103.22(a) (1985)).[2] At the time of petitioner's offenses, the Act made it a misdemeanor for a financial institution willfully to fail to file a CTR (31 U.S.C. 5322(a)), but the Act imposed felony liability when that failure was "part of a pattern of illegal activity

---

[1] Co-defendants James McDonough, Carol Orlandella, and Patricia Murphy were acquitted on all charges. The trial court also directed a verdict of acquittal on Count One of the indictment, charging petitioner and others with conspiring to conceal from the Internal Revenue Service 36 reportable currency transactions. Pet. App. A3-A4.

[2] 31 U.S.C. 5313 provides, in pertinent part:

> § 5313. ***Reports on domestic coins and currency transactions***
>
> (a) When a domestic financial institution is involved in a transaction for the payment, receipt, or transfer of United States coins or currency (or other monetary instruments the Secretary of the Treasury prescribes), in an amount, denomination, or amount and denomination, or under circumstances the Secretary prescribes by regulation, the institution and any other participant in the transaction the Secretary may prescribe shall file a report on the transaction at the time and in the way the Secretary prescribes. A participant acting for another person shall make the report as the agent or bailee of the person and identify the person for whom the transaction is being made.

The regulation in effect at the time of petitioner's violations provided (Pet. App. A2 n.3):

> § 103.22 ***Reports of currency transactions***
>
> (a)(l) Each financial institution, other than a casino, shall file a report of each deposit, withdrawal, exchange of currency or other payment or transfer, by, through, or to such financial institution, which involves a transaction in currency of more than $10,000.

involving transactions of more than $100,000 in a 12-month period" (31 U.S.C. 5322(b)).[3]

2. Petitioner (the Bank) is a financial institution with several branches in and around Boston, Massachusetts. The evidence at trial established that on 31 occasions between May 1983 and July 1984 co-defendant James McDonough, a bank customer, withdrew more than $10,000 in cash from a single account at one branch of the Bank. In each instance, McDonough presented multiple counter checks to a single bank teller and received in return a lump sum of currency in excess of $10,000. Pet.

---

[3] The statute then in effect provided:

§ 5322. *Criminal penalties*

(a) A person willfully violating this subchapter or a regulation prescribed under this subchapter (except section 5315 of this title or a regulation prescribed under section 5315) shall be fined not more than $1,000, imprisoned for not more than one year, or both.

(b) A person willfully violating this subchapter or a regulation prescribed under this subchapter (except section 5315 of this title or a regulation prescribed under section 5315), while violating another law of the United States or as part of a pattern of illegal activity involving transactions of more than $100,000 in a 12-month period, shall be fined not more than $500,000, imprisoned for not more than 5 years, or both.

Section 5322 has twice been amended since the time of petitioner's offenses. In 1984, Section 5322(a) was amended to provide for a fine of not more than $250,000, a term of imprisonment of not more than five years, or both. Act of Oct. 12, 1984, Pub. L. No. 98-473, § 901(b), 98 Stat. 2135. In 1986, Section 5322(b) was amended to increase the maximum prison term to ten years and to replace the words "illegal activity involving transactions of" with the words "any illegal activity involving." Money Laundering Control Act of 1986, Pub. L. No. 99-570, § 1357(g), 100 Stat. 3207-26. The latter change was designed to make clear that Section 5322(b) applied to violations of any unlawful activity involving more than $100,000, not just to violations of the Bank Secrecy Act. See S. Rep. 99-433, 99th Cong., 2d Sess. 20 (1986).

App. A3.[4] Petitioner failed to file a CTR for any of those transactions (*id.* at A5).

The evidence showed that the Bank's employees and agents knew that CTRs must be filed for currency transactions in excess of $10,000.[5] In addition to the instructions to that effect on the CTR form itself,[6] in May 1983 a memo was distributed to branch managers and head

---

[4] McDonough would frequently telephone in advance to alert the tellers that he planned to withdraw a specific amount of cash, because the tellers normally did not keep such substantial cash reserves on hand (C.A. App. 297-298, 772-773, 1003-1004, 1431, 1774). Withdrawals also required the approval of a head teller or platform employee, who would initial the request (*id.* at 285-287, 291, 295, 389-402, 510-511, 794, 1431, 1433). The head tellers knew which transactions required CTR filings based on the teller requests for cash approval (*id.* at 868-869).

[5] Petitioner suggests in passing (Pet. 4) that at the time "it was far from clear" that McDonough's withdrawals were reportable under the Bank Secrecy Act. As the court of appeals observed (Pet. App. A5-A12), that is simply not so. To be sure, some courts have held that the reporting obligations under the Act do not extend to bank customers (see, e.g., *United States* v. *Varbel*, 780 F.2d 758, 762 (9th Cir. 1986); *United States* v. *Larson*, 796 F.2d 244 (8th Cir. 1986)), or to transactions in excess of $10,000 that are executed at different banks (see, *e.g.*, *United States* v. *Denemark*, 779 F.2d 1559 (11th Cir. 1986)), at different bank branches (see, *e.g.*, *United States* v. *Larson*, *supra*; *United States* v. *Reinis*, 794 F.2d 506 (9th Cir. 1986); *United States* v. *Dela Espriella*, 781 F.2d 1432 (9th Cir. 1986)), or on different days (see, *e.g.*, *United States* v. *Anzalone*, 766 F.2d 676 (1st Cir. 1985)). To our knowledge, however, no court has ever held that a financial institution may escape liability under the Act when it fails to file a CTR for a transfer of currency in excess of $10,000 to a single customer, at a single bank branch, on a single day.

[6] Each CTR states (C.A. App. 2428):

> * * * Multiple transactions by or for any person which in any one day total more than $10,000 should be treated as a single transaction, if the financial institution is aware of them.

tellers—the persons primarily responsible for CTR compliance (see C.A. App. 209-210, 212, 737, 791, 1594-1595, 1771)—stating that multiple transactions by the same person occurring at different times on the same day should be aggregated and, if they totalled in excess of $10,000, should be reported (C.A. App. 2317).[7] The Branch Manual and the Tellers' Manual, both readily available to petitioner's employees, also gave instructions on filing CTRs (C.A. App. 373, 2336, 2359, 2380). Moreover, in 1981 and again in 1983, a bank auditor discussed with the branch head tellers the difficulties in detecting multiple transactions executed at different times and different branches, and explained how the employees should comply with the CTR rules when multi-check transactions were involved (C.A. App. 877-881, 886-892). The Bank's president acknowledged at trial that he understood the Bank's reporting obligations, and he stated his belief that transactions like McDonough's were reportable. See, *e.g.*, C.A. App. 1582, 1585-1587, 1593, 1616.[8]

The Bank's employees and agents were also well aware of McDonough's frequent and unusually large cash withdrawals. McDonough was the only bank customer of the branch who withdrew funds by using counter checks, rather than pre-coded checks. In addition, he commonly used multiple checks when one check would clearly have been sufficient. C.A. App. 294, 307-308, 509, 753. The personnel in the branch speculated that McDonough was a "bookie" and concluded that he presented the multiple checks in order to evade the CTR requirements (C.A. App.

---

[7] Copies of this memorandum were found in the files of petitioner's Prudential Branch, at which the McDonough transactions occurred (C.A. App. 1242).

[8] The court of appeals found that these facts provided "convincing evidence that the Bank knew that [McDonough's] withdrawals were reportable" (Pet. App. A25).

190-199, 214-217, 748-755, 757, 762, 784, 1766, 1850, 1894-1896, 1899-1901, 1917).[9] On one occasion a line teller asked the head teller whether a CTR should be filed for one of McDonough's multiple-check cash withdrawals. After consulting with the branch manager, the head teller replied that no CTR should be filed because McDonough was a "good customer" who would get "mad" if a form were filed (Pet. App. A25; C.A. App. 1011-1014, 1027, 1051, 1099-1100). It was not until May 1985, after it had received a federal grand jury subpoena and months after a state grand jury had subpoenaed bank employees, that petitioner filed reports on McDonough's transactions (Pet. App. A26; C.A. App. 1319-1321, 1383, 1578).

3. The trial court instructed the jury on knowledge and intent, both with respect to the individual defendants and with respect to the Bank. The court emphasized that knowledge cannot be shown by a mere "failure that is done by mistake or accident, or for some other innocent reason" (Pet. App. A33). The court then explained (*id.* at A34-A35):

> The element of knowledge may * * * be inferred from evidence that a defendant deliberately closed her eyes with a conscious purpose to avoid learning about the requirements which would otherwise have been obvious to her. In other words, you may, but you do not have to, infer knowledge from a defendant's willful blindness to the requirement. You cannot infer knowledge simply because a person may have been negligent or may have been stupid, or may have made a mistake.

---

[9] On one occasion, McDonough objected when a teller prepared a CTR, and he complained to Bank officials that he did not want the government to learn of his business (C.A. App. 614-618, 641-645, 657, 683-689, 692-693, 710-712).

The court next focused on the Bank, explaining (*id.* at A37-A38):

> The bank is * * * a corporation. And it acts through its officers, employees and agents. The bank is responsible for the acts of each employee, but it is also responsible for its conduct as an institution.
>
> * * * * *
>
> Now, let me talk about the concep of knowledge in the context of the bank. In deciding what the bank knew of * * * C.T.R. filing requirements, look first at the conduct and statements of each employee, regardless of his or her level of responsibility, and decide whether when acting within the scope of his or her employment the employee knew of the requirement in the context of multiple checks. You can look at all of the employees of the bank. And if any employee knew that multiple checks would require the filing of reports, the bank knew it, provided the employee knew it within the scope of his employment, as I have defined it to you.
>
> * * * So, if you find that an employee within the scope of his employment knew that C.T.R.s had to be filed, even if multiple checks are used, the bank is deemed to know it. The bank is also deemed to know it if each of several employees knew a part of that requirement and the sum of what the separate employees knew amounted to knowledge that such a requirement existed.

The court then explained the element of willfulness. It first charged that "[w]illfully means voluntarily, intentionally, and with a specific intent to disregard, to disobey the law, with a bad purpose to violate the law" (Pet. App. A33). When it focused on the Bank, the court instructed (*id.* at A38-A39):

In deciding whether the bank acted willfully, again you have to look first at the conduct of all employees and officers, and, second, at what the bank did or did not do as an institution. The bank is deemed to have acted willfully if one of its employees in the scope of his employment acted willfully. So, if you find that an employee willfully failed to do what was necessary to file these reports, then that is deemed to be the act of the bank, and the bank is deemed to have willfully failed to file.

* * * * *

Alternatively, the bank as an institution has certain responsibilities; as an organization, it has certain responsibilities. And you will have to determine whether the bank as an organization consciously avoided learning about and observing C.T.R. requirements. The Government has to prove the bank guilty on this theory, has to show that its failure to file was the result of some flagrant organizational indifference. In this connection, you should look at the * * * evidence as to the bank's effort, if any, to inform its employees of the law; its effort to check on their compliance; its response to various bits of information that it got in August and September of '84 and February of '85; its policies, and how it carried out its stated policies.

* * * * *

If you find that the Government has proven with respect to any transaction either that an employee within the scope of his employment willfully failed to file a required report or that the bank was flagrantly indifferent to its obligations, then you may find that the bank has willfully failed to file the required reports.

4. The court of appeals unanimously affirmed (Pet. App. A1-A30). It rejected the contention (*id.* at A19-A24)

that the trial court's instructions effectively relieved the government of its burden of proving that petitioner had acted willfully. The court of appeals explained (*id.* at A23) that the instructions, "when viewed as a whole, directed the jury not to convict for accidental, mistaken or inadvertent acts or omissions." Rather, the court observed, the instructions were consistent with this Court's cases defining willfulness, in both civil and criminal contexts, as " 'a disregard for the governing statute and an indifference to its requirements' " (*id.* at A23-A24 (citations omitted)). The court of appeals also held (*id.* at A17-A19) that the 31 McDonough transactions had been properly charged as separate felonies, because each of those offenses was "part of a pattern of illegal activity involving transactions of more than $100,000 in a 12-month period" (31 U.S.C. 5322(b)). The court found (Pet. App. A17) that that construction "comports with the plain language of the statute and its legislative history and has solid precedential support."[10]

ARGUMENT

1. Petitioner contends (Pet. 7-12) that by instructing the jury that a corporation's knowledge and willfulness may be predicated on evidence of "flagrant indifference," the trial court effectively relieved the government of the burden to prove specific intent.[11] The court of appeals

---

[10] The court of appeals also held that the Bank Secrecy Act applied to McDonough's cash withdrawals (Pet. App. A4-A12), that the trial court's instruction on the statutory "pattern" element was not defective (*id.* at A12-A16), that the evidence of willfulness was sufficient (*id.* at A24-A26), and that certain evidence had been properly admitted (*id.* at A26-A30). The petition does not present those issues.

[11] Petitioner also asserts (Pet. 9) that the "threshold" of willfulness was "dropped even lower" when the trial court stated in a supplemental instruction that petitioner could be found to have acted willfully if "as an institution [it] was plainly indifferent to its obligations"

correctly rejected that argument.[12]

The trial court referred to "flagrant organizational indifference" when it instructed the jury on the theory of

---

(Pet. App. 40). The court gave that supplemental instruction, in response to a juror's inquiry, to make clear that petitioner's intent should be evaluated separately from the intent of co-defendant McDonough. Read in context, that single, brief instruction did not amend the court's earlier instructions on conscious avoidance. See *Cupp* v. *Naughten*, 414 U.S. 141, 146-147 (1973); *United States* v. *Toner*, 728 F.2d 115, 124 (2d Cir. 1984); *United States* v. *Guillette*, 547 F.2d 743, 750 (2d Cir. 1976), cert. denied, 434 U.S. 839 (1977). Moreover, in objecting at trial to the supplemental charge, petitioner did not claim that "plain indifference" reflects a lower level of intent than "flagrant organizational indifference." See C.A. App. 2071-2072. It may not rely on any such distinction now. See *United States* v. *Kallash*, 785 F.2d 26, 28-29 (2d Cir. 1986) (general objection to a conscious avoidance charge is insufficient to preserve challenge to a particular error in the charge). See also *United States* v. *Markowski*, 772 F.2d 358, 363 (7th Cir. 1985), cert. denied, 475 U.S. 1018 (1986); *United States* v. *Swafford*, 766 F.2d 426, 429 (10th Cir. 1985); *United States* v. *Hecht*, 705 F.2d 976 (8th Cir. 1983). Indeed, petitioner itself used the terms interchangeably at the charging conference (C.A. App. 1946-1947, 1949, 1954-1955), and in closing argument (*id.* at 2000); see also *id.* at 2011, 2023-2024). Cf. *United States* v. *Lemire*, 720 F.2d 1327, 1343 (D.C. Cir. 1983), cert denied, 467 U.S. 1266 (1984).

[12] In passing, petitioner also challenges (Pet. 9) the court of appeals' conclusion (Pet. App. A22) that "[a] collective knowledge instruction is entirely appropriate in the context of corporate criminal liability." Petitioner does not, however, dispute that the lower federal courts have routinely approved that instruction in similar cases. See, *e.g.*, *Riss & Co.* v. *United States*, 262 F.2d 245, 250 (8th Cir. 1958); *St. Johnsbury Trucking Co.* v. *United States*, 220 F.2d 393 (1st Cir. 1955); *Inland Freight Lines* v. *United States*, 191 F.2d 313, 315 (10th Cir. 1951); *United States* v. *T.I.M.E.-D.C., Inc.*, 381 F. Supp. 730 (W.D. Va. 1974); *United States* v. *Sawyer Transp., Inc.*, 337 F. Supp. 29, 30-31 (D. Minn. 1971), aff'd, 463 F.2d 175 (8th Cir. 1975). Accord Note, *Developments in the Law—Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 Harv. L. Rev. 1227, 1248 (1979).

"conscious avoidance." The court explained (Pet. App. A38-A39) that the element of willfulness may be established either by showing that one of petitioner's employees acted willfully or, alternatively, by proving that "the bank as an organization consciously avoided learning about and observing C.T.R. requirements." In making the latter showing, the trial court stated (*id.* at A39), the government would have to establish that the bank's failure to file was the product of "some flagrant organizational indifference."

The courts have routinely approved conscious avoidance instructions in criminal cases "where a defendant has claimed lack of some specific aspect of knowledge necessary to conviction but where the evidence may be construed as deliberate ignorance" (*United States* v. *Lanza,* 790 F.2d 1015, 1022 (2d Cir. 1986), cert. denied, No. 86-5129 (Oct. 6, 1986)). Moreover, it is not at all uncommon for conscious avoidance charges to define "deliberate ignorance" as "indifference"—whether flagrant or otherwise—to the obligations of law. See, *e.g.*, *United States* v. *Schiff,* 801 F.2d 108, 112-113 (2d Cir. 1986), cert. denied, No. 86-1026 (Mar. 30, 1987) (approving conscious avoidance charge on element of willfulness in criminal tax case; charge instructed the jury that it "may consider whether or not the Defendant displayed a deliberate indifference or refusal to be informed"); *United States* v. *Schaffer,* 600 F.2d 1120, 1121 (5th Cir. 1979) (in prosecution for making false statements, court held that " 'reckless indifference' can be equated with 'knowingly and willfully' ").[13]

---

[13] See also *United States* v. *Hathaway,* 798 F.2d 902, 911 (6th Cir. 1986) (misrepresentation element of mail and wire fraud may be satisfied by proof that statements were made with reckless indifference as to their truth or falsity); *United States* v. *Boyer,* 694 F.2d 58, 59 (3d Cir. 1982) (in mail fraud and securities fraud prosecution, court approved instruction that "reckless indifference is the equivalent of intentional misrepresentation"); *United States* v. *Demauro,* 581

This Court approved a similar definition of "willfulness" in *United States* v. *Illinois Central R.R.*, 303 U.S. 239 (1938). In that case, the Court upheld a fine on a corporation charged with willfully confining cattle during interstate travel for a period longer than federal law allowed. The Court held (303 U.S. at 243 (citations omitted)) that "willfully" meant " 'purposely or obstinately and is designed to describe the attitude of [a defendant] who, having a free will or choice, either intentionally disregards the statute or is plainly indifferent to its requirements.' "[14]

Petitioner claims (Pet. 11-12) that a jury instruction using the phrase "flagrant indifference" may convert "[v]irtually every * * * lack of communication" into a "multi-million dollar fine[]." That prediction, however, is needlessly overdrawn. The trial court explained to the jury at the outset (Pet. App. A33) that an offense must be committed "knowingly" and "willfully" in order "to exclude a failure that is done by mistake or accident, or for some other innocent reason." Simple "omissions" (Pet. 11),

---

F.2d 50, 54 (2d Cir. 1978) (corporate criminal liability under the Bank Secrecy Act may be established by proof that the bank's supervisory employees "acted with plain indifference" to the law). Cf. *United States* v. *Gold*, 743 F.2d 800, 822 (11th Cir. 1984), cert. denied, 469 U.S. 1217 (1985) (conscious avoidance charge on knowledge was warranted in medicare fraud case where "the record was replete with testimony that suggested indifference by the defendants at best and deliberate criminality at worst").

[14] Petitioner seeks to distinguish the *Illinois Central* case, claiming that the present case involves a "fiscal offense" (Pet. 10), and therefore requires proof of "evil purpose," which cannot be satisfied by evidence of "flagrant indifference." But the Court in *Illinois Central* described "willfulness" under the statute as " 'intentional, or knowing, or voluntary' " conduct (303 U.S. at 243 (citation omitted)), precisely the same standard that the Court has since applied to the "fiscal offense" of tax evasion. See *United States* v. *Pomponio*, 429 U.S. 10, 12-13 (1976) (per curiam). It is hard to see why evidence of " 'plain[ ] indifferen[ce]' " (303 U.S. 243 (citation omitted)) would be sufficient in one setting but not the other.

without more, would not constitute "willfulness" within the meaning of those instructions. Thus, when "viewed in the context of the overall charge" (*Cupp* v. *Naughten*, 414 U.S. 141, 147 (1973)), the reference to "flagrant indifference" has none of the dramatic implications that petitioner assigns to it.

2. Petitioner next contends (Pet. 12-16) that this Court should review the question whether under 31 U.S.C. 5322(b) the Bank was properly charged with a separate felony for each of the 31 McDonough currency transactions. That issue warrants no further review.

a. At the time of petitioner's offenses, 31 U.S.C. 5322(b) provided that "[a] person willfully violating this subchapter or a regulation prescribed under this subchapter * * * as part of a pattern of illegal activity involving transactions of more than $100,000 in a 12-month period, shall be fined not more than $500,000, imprisoned for not more than 5 years, or both." Because McDonough's unreported cash transactions aggregated to more than $100,000 in each 12-month period, the Bank was charged with 31 felony violations, one for each of the 31 transactions.

The plain language of the statute authorized a separate charge for each of those transactions. The version of Section 5322(b) that was in force at the time of petitioner's offenses proscribed "violations" of the Bank Secrecy Act, when those violations were "part of a pattern of illegal activity involving transactions of more than $100,000 in a 12-month period." It was the individual violation, and not the "pattern of illegal activity," that was the focus of the proscription. See *United States* v. *Kattan-Kassin*, 696 F.2d 893, 895-896 (11th Cir. 1983). By contrast, when Congress has sought to criminalize a pattern of activity, rather than simply an individual violation, it has done so expressly. See 18 U.S.C. 1962(c) ("pattern of racketeering activity"); 21 U.S.C. (& Supp. III) 848 ("continuing criminal enterprise"). Because there is thus nothing "unclear" (Pet. 13) about the statutory language, petitioner's reliance on the

rule of lenity (*id.* at 15-16) is misplaced. *United States* v. *Turkette*, 452 U.S. 576, 587 n.10 (1981); *United States* v. *Culbert*, 435 U.S. 371, 379 (1978); *Ash Sheep Co.* v. *United States*, 252 U.S. 159, 170 (1920).

Petitioner contends, however, that the language of the statute must be construed in light of Congress's intention to punish more severely those offenses " 'involv[ing] very large sums of money' " (Pet. 14 (citations omitted)). It therefore concludes (*ibid.*) that liability under Section 5322(b) should depend on "the amount of money involved" and not on "the number of trips to the bank." Petitioner has set up a false dichotomy, however. Liability under Section 5322(b) plainly turns on both the dollar amount of the crime and the existence of a "pattern" of offenses. Congress determined that repeated offenses under the Bank Secrecy Act should receive greater punishment than an isolated violation, and it therefore incorporated in the statute the requirement that there be a "pattern" of illegality. Had Congress been concerned solely with the dollar amount of the unreported transactions, it surely would not have added a pattern element to the offense.[15]

b. Petitioner also asserts (Pet. 12-14) that the circuits are in conflict concerning the proper interpretation of Section 5322(b). That claim, however, is premised on a misreading of two decisions of the Ninth Circuit.

In *United States* v. *Beusch*, 596 F.2d 871 (9th Cir. 1979), the defendants were charged with four felony counts, arising from a series of violations of the Bank Secrecy Act committed over a four-year period. The district court

---

[15] Petitioner also bases its reading of Section 5322(b) on the assumption (Pet. 15) that Congress did not intend to enact a statute in which "there could never be a single felony." But first, the statute does not *require* multiple charges; the decision as to how many counts to charge rests, as it often does, with the prosecutor. In any event, the complaint that nobody can commit just one felony is not a sufficient reason to ignore, as petitioner does, the plain language of the statute.

dismissed the felony counts, concluding that a violation of the Bank Secrecy Act may be prosecuted as a felony only when it is committed in conjunction with violations of other criminal statues. The court of appeals rejected that analysis and reinstated the felony charges. It held (596 F.2d at 878) that "a series of misdemeanor violations of the act may, by themselves, call forth the increased penalties" under the Act. However, because the government had charged only four felonies in the case—each corresponding to a separate 12-month period—the court had no occasion to decide whether the individual unreported transactions could have been prosecuted as separate felonies. The Ninth Circuit has confirmed that limited reading of the *Beusch* case. See *United States* v. *So*, 755 F.2d 1350, 1355 (9th Cir. 1985).

The Eleventh Circuit thereafter addressed the same issue in the *Kattan-Kassin* case, on which the court of appeals in the present case relied (Pet. App. A18-A19). There, the court approved an indictment treating each of several violations of the Bank Secrecy Act as a felony because each was "part of a pattern of illegal activity involving transactions exceeding $100,000 in a 12-month period." The court concluded (696 F.2d at 898) that the plain language and legislative history of the statute "clearly indicated that each violation could be prosecuted as a separate felony."

The Ninth Circuit next considered the issue in *United States* v. *So*, *supra*. In that case, the government charged the defendants with two misdemeanor counts and four felonies, apparently on the theory that only after the first two violations did the defendant's total transactions exceed $100,000. The court was therefore required to decide in *So* only the question whether the government was free to charge a separate felony for each transaction above the $100,000 limit. Relying on the Eleventh Circuit's decision

in *Kattan-Kassin* (755 F.2d at 1355), the court concluded that the felony charges were proper. The court did not, however, announce a general rule that violations of the Bank Secrecy Act may not be treated as felonies until the $100,000 threshold has been reached (Pet. 14). That broader question was simply not presented in the case.[16]

The decision of the court below is expressly consistent with *Kattan-Kassin* (see Pet. App. A19). Moreover, because the holding of the Ninth Circuit in *So*, following the decision in *Kattan-Kassin*, was simply that multiple felony charges may be brought within a 12-month period under the Bank Secrecy Act, that court's decision is likewise consistent with the decision below.[17]

Even if there were some tension between the Ninth Circuit cases and the decision in this case, this would not be an appropriate case in which to address that issue. As we have noted, Congress amended Section 5322(b) in 1986, using more expansive language to describe the pattern of illegal activity necessary to trigger the felony provisions of that section. The change in the statutory language makes it appear even clearer that each reporting violation is a felony if it is committed as part of a pattern of illegal activity that involves a total of $100,000 within a 12-month period, regardless of whether the reporting violation at issue occurs at the outset of that pattern of illegal activity or at the end, after the $100,000 amount has been reached. In light of the new statutory language, there is no need for this Court to grant review for the purpose of construing the version of the statute that was in effect prior to 1986.

---

[16] In that respect, the court of appeals in the present case described the holding in the *So* case too broadly. See Pet. App. A18.

[17] To our knowledge, the Ninth Circuit has never held that felony charges may be brought only for transactions that occur after the $100,000 threshold is crossed in a particular 12-month period.

In any event, as the court below noted (Pet. App. A18), the Bank's total fine in this case did not exceed what it could have received even under petitioner's interpretation of *So*. Petitioner recognizes as much (Pet. 14), but contends (*id.* at 15-16) that under the Ninth Circuit's decision in *Beusch* the Bank could have received only one fine for each 12-month period. As we noted above, however—and as the Ninth Circuit confirmed in the *So* case—the court in *Beusch* did not announce any such rule.

Finally, there is no support for petitioner's speculation (Pet. 16) that "the sentence (of $40,000 *per* count) might well have been lower, and the jury less prone to convict, had fewer counts been charged." The transcript of the sentencing proceeding offers cold comfort to petitioner's hypothesis. The trial court explained that "[t]he fines authorized are substantial, and * * * Congress intended that fines under the section * * * have a real economic impact; in short, that they be of a magnitude that cannot be written off as merely a cost of doing business" (C.A. App. 2115-2116). Because the court found that the Bank's offenses "resulted * * * from a systematic disregard of cash reporting requirements[]" (C.A. App. 2117-2118), it determined that "something more than a very modest fine * * * [was] appropriate" (C.A. App. 2118).

There is likewise no evidence to support the supposition that the jury might have acquitted petitioner if fewer offenses had been alleged. First, there is no reason to suppose that the prosecutor would have charged fewer offenses simply because many of them, under petitioner's theory, would have been misdemeanors. Second, there is no basis to assume that a well-instructed jury, following the trial court's instructions, would have been less prone to convict simply because fewer charges were contained in the indictment. See C.A. App. 2049. Cf. *Richardson* v. *Marsh*, No. 85-1433 (Apr. 21, 1987), slip op. 6; *Spencer* v. *Texas*, 385 U.S. 554, 562 (1967); *Opper* v. *United States*, 348 U.S 84, 95 (1954).

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

CHARLES FRIED
Solicitor General
WILLIAM F. WELD
Assistant Attorney General
SARA CRISCITELLI
Attorney

OCTOBER 1987

U.S. GOVERNMENT PRINTING OFFICE: 1987—202-037/60061